In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1116

STEPHEN R. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's sole contention is that the courts below should have held that he was entrapped as a matter of law, thus removing the question from jury determination.

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted on a four-count indictment of unlawfully distributing and unlawfully possessing with intent to distribute methylenedioxy amphetamine (MDA) and cocaine in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of five years' imprisonment on each count. The court suspended all but six months of the sentence. The court of appeals affirmed (one judge dissenting) in an opinion on which we principally rely (Pet. App. I).

The facts are fully set forth in the opinion of the court of appeals. The court stated (Pet. App. I, A-3):

The testimony of several special agents, called by the government, tended to establish the following version: On Sunday, April 1, 1973 at 3 p.m., Special Agent Casteel and Joseph Hale, a paid informer, went to the trailer where Smith lived. This was at Carbondale, Illinois, and Smith was a student at Southern Illinois University. Hale introduced Casteel to Smith and asked if Cronson, Smith's roommate, had made arrangements for the purchase of either cocaine or MDA. Smith said Cronson wasn't there, but Smith had contacted a source of supply and Smith would handle the transaction. Smith said the purchase would probably take place later that day, and asked Casteel where he would be. Casteel gave him his room number at a motel.

At 5 p.m. that day, Smith came to the room. Casteel and Hale were there, with Special Agent Bushendorf secreted in the bathroom. Smith told Casteel he could buy an ounce of cocaine for $1,050 or an ounce of MDA for $375. Casteel agreed to buy the MDA and asked for a small sample of the cocaine to see whether he wanted to buy a quantity later. Smith then telephoned someone he called Roger, informed him of the order, and said he would be over in a few minutes. Smith left, returned about an hour later and delivered the MDA, for which payment was made. He asked to see Casteel's and Hale's wallets to see if they were police. After that he turned over a small sample of cocaine.

This testimony was controverted by that of petitioner. The court of appeals summarized petitioner's testimony as follows (Pet. App. I, A-4 to A-5):

> Smith testified that he met two men named Joe (who turned out to be Hale and Jovonovich) on Sunday, two weeks before the sale. They had met Cronson before and had been asking how they could buy large quantities of drugs. He described meeting with Hale and either Jovonovich or Casteel on five occasions before the day on which he made the sale. They repeatedly spoke "very strongly about how they wanted to make a fast possession" of huge amounts of drugs so they could make money. "They were asking Bill, Chris, and myself if we could get them for them, and if we couldn't, who could?" He described the attitude of the students toward the agents as "rather cold," and was surprised the agents kept coming back. Except for deception as to identity, there was no testimony of any misrepresentation by the agents or the informer. Smith testified to statements that were, on their face, threats to "break into our trailer and take our belongings," but conceded these things were said in a joking manner. The only pressure claimed, in substance, was that the requests were repeated a number of times before the sale. There was no play upon sympathy as in *Sherman* [v. *United States,* 356 U.S. 369].

Petitioner contends that he was pressured into selling two government agents narcotics and that the persistence by the agents constituted entrapment as a matter of law.[1] The issue of entrapment was presented to the jury on uncontestedly proper instructions

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[1]Petitioner also contends that the government failed to meet its burden of proof in rebutting his claim of entrapment. The evidence enumerated above refutes this claim.

This case does not involve the question in *Hampton* v. *United States,* 74-5822, certiorari granted March 31, 1975, whether entrapment as a matter of law is established when the government supplies a defendant with contraband.

and the jury found petitioner guilty. The court of appeals correctly ruled that the evidence was sufficient to warrant submitting the question to the jury and for the jury to find that petitioner was not entrapped. The court stated (Pet. App. I, A-2 to A-3):

> As stated in *Sorrells* v. *United States*, 287 U.S. 435, 441-42 (1932), "the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and strategem may be employed to catch those engaged in criminal enterprises. . . . A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." It was said in *Sherman*, at 372, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."
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> "Entrapment as a matter of law is established only where undisputed testimony makes it patently clear that an otherwise innocent person was induced to commit the act complained of by the trickery, persuasion, or fraud of the government agent." *United States* v. *Millpax, Inc.*, 313 F.2d 152, 156 (7th Cir. 1963), citing *Sorrells; United States* v. *Haden*, 397 F.2d 460, 466 (7th Cir. 1968) *cert. den.* 396 U.S. 1027, citing *Sherman* and *Sorrells*.

The court of appeals correctly concluded that entrapment was not shown as a matter of law and therefore was a question of fact for the jury to determine (Pet. App. I, A-5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.